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Preparing for the Separation Agreement 'Fire Drill'

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Whether you are an in-house attorney, a human resources representative or outside employment counsel, you are likely familiar with the time-sensitive directive to send along your "form" separation and release agreement for an employee who is about to be terminated. Even though the clock is ticking, you know there is no such thing as a "one-size-fits-all" separation agreement, and a "fire drill" of this nature is fraught with risks. What can you do to balance this need for speedy action with the need to adequately protect the employer's interests? This article is intended to be a practical guide on critical issues that employers should at least consider before issuing a severance agreement to a departing employee.

For more information about any of the considerations addressed below, other possible considerations, or any of the risks involved with the termination at hand, consultation with a subject matter expert is strongly recommended.

*(1) How many employees are being terminated at or around this time?*This may seem like a softball question, but the answer can significantly impact certain terms in the severance agreement. If the termination is considered a group termination program under the Age Discrimination in Employment Act (ADEA), that is, more than one employee in a "decisional unit" as defined under the ADEA is being terminated, any ADEA claims will not be properly waived unless, in addition to all of the Older Workers Benefit Protection Act requirements, the following criteria are satisfied for your 40-or-over employees: (a) the employee is afforded a *45-day* severance agreement review period, with a seven-day revocation period; (b) the employee receives a list of the ages and job titles or job categories of all employees in the same "decisional unit" who were considered for termination and whether the individual was selected or not selected for termination; and (c) the employee receives a description of the eligibility factors for the group termination program.

*(2) What are the ages of those being terminated and how does this impact the review and revocation periods?*This, too, may seem like an obvious question, but in "fire drill" situations we might forget to ask the basics. If the departing employee is 40 years old or older, and this is a stand-alone termination that does not include other employees, the severance agreement must clearly state that the employee has 21 calendar days to review the

agreement and seven calendar days to revoke it (compared with the 45- and seven-day periods mentioned above). A frequent related question is: how much time does the company have to give employees who are *under* 40 (whether in group or single elimination) to review the severance agreement? While companies typically seek to obtain employee signatures on these agreements as soon as possible, a waiver of claims will not be valid if it is not "knowing and voluntary." Thus, a "reasonable" amount of notice should be given. Since the ADEA requires 21 days for single elimination, a 21-day review period for an under-40 employee should be deemed reasonable. Shorter periods, such as a one week or 10 days, may also be reasonable under the circumstances. In addition, in group terminations, it is common (even if not required) for employers to give the under-40 employees the same 45-day review period.

*(3) What claims should be included in the release-of-claims provision?*This, of course, is one of the most important parts of the separation agreement. Employers will want employees to release all claims related to or arising out of the employment relationship and/or the termination thereof. In addition to releasing contract, tort and common-law claims, it is prudent to list all the statutory claims (federal, state, local) that an employee will be releasing, as some claims cannot be properly waived unless they are expressly referenced in the release. In deciding which state/local laws to include, it is best practice to broadly include all relevant state/local statutes in the release, which may include the laws of the state or municipality where the employee worked and where the employer's headquarters are located. In addition, you should always check to see which state laws cannot be released (e.g., unemployment benefit claims). Finally, the employee must not be prohibited from filing a charge or complaint with a fair employment practices agency, such as the Equal Employment Opportunity Commission, or the National Labor Relations Board, but you can generally require the employee to waive the right to recover monetary relief in any such proceeding.

*(4) What state should be included in the choice of law and venue provision?*Because courts around the country may enforce a choice of law or venue provision, it is important to consider which state (and county) you would ideally like all disputes arising under the separation agreement to be brought in and which state law you would like to apply. The location of the employee and the employer's headquarters are key factors to consider here. Since the separation agreement as a whole will be analyzed under state contract law, companies like to also consider whether certain states have more favorable contract principles for employers.

*(5) What compensation/benefits is the employee entitled to before severance payments are considered?*You should be sure to understand what compensation and benefits the employee is *entitled* to receive under company policy and applicable law, regardless of whether the employee signs the separation agreement. Typically, such compensation/benefits are enumerated in the agreement, with a provision that the employee acknowledges he/she is only owed this amount, and any additional payments or benefits are provided as consideration for the employee's covenants under the agreement (including the release of claims). In this bucket, it is generally advisable to have the employee affirm that all wages, earned commissions, accrued but unused paid time off/sick time, stock options, unpaid business expenses and earned bonuses to which the employee is entitled have been paid.

*(6) Does the departing employee participate in any medical, dental and/or vision plans? If so, when do such benefits terminate?*In most cases, the controlling benefit plan states when an employee's benefits will end. Usually, it is the date of termination or the end of the month in which the termination occurs. The employer should reference this date in the separation agreement to avoid confusion. With respect to group medical benefits, a departing employee may qualify for continued benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA) if the employer has 20 or more employees, or under state "mini-COBRA" laws. It is recommended that the employee be informed about these applicable benefits in the separation agreement and that information about continuing coverage will be provided.

*(7) What severance benefits are being offered to the employee?*This, of course, is the "bottom line" that employees will focus on when presented with a separation agreement. In deciding on the "bottom line," the employer should first consider whether it must offer a certain amount pursuant to a company severance policy or practice. Absent the guidance of such a policy or practice, companies usually determine a monetary amount and then decide whether to pay out the severance in a lump sum, as a salary continuation or in periodic installments. In considering these options, there are tax consequences that are sometimes overlooked. Your company should analyze whether paying the severance out in installments (as opposed to in a lump sum) causes the agreement to fall within the purview of Section 409A of the Internal Revenue Code. An expert in this area should be consulted for analysis and assistance with the appropriate "409A" language for the agreement. There are also other severance benefits that companies may consider, including payment of COBRA premiums on behalf of employees, payment of bonuses not otherwise earned or required, and outplacement services, to name a few.

*(8) Has the employee signed any agreement during employment that imposes post-employment obligations?*Typically, separation agreements contain a catch-all "entire agreement" clause which states that the separation agreement is the entire agreement between the parties on the matter. However, it is important to ascertain whether there are any other agreements that the employee signed during his/her employment (e.g., any confidentiality, nonsolicitation or noncompetition agreements) that should be expressly referenced and incorporated into the severance agreement. If there is an employment agreement in place, you will also want to review that agreement to ensure that relevant provisions of such agreements are referenced, or expressly superseded, as may be the case. In addition, you should always check the collective bargaining agreement of a unionized employee for any applicable provisions. If there are no agreements in place that impose post-employment restrictions, like a nonsolicitation or a noncompete, you can consider whether to add one to the separation agreement. The enforceability of restrictive covenants in separation agreements is a highly state-specific inquiry and, therefore, you must check the law of the state that governs the agreement. In New Jersey for example, limited restrictive covenants may be enforced in separation agreements.

*(9) What should the separation date be for purposes of the separation agreement?*This sounds like an easy question, but the complication here is that under the separation agreement, employees will be releasing all claims related to their employment *through the date of execution* (employees cannot release future claims). Thus, if an employee signs the agreement before actually separating from the company, the company may be exposed to claims during the window of time between execution and separation. Employers can avoid this altogether by providing the agreement to employees on their last day of work. However,

when a company needs a departing employee to stay on for transition purposes, best practice is to advise such employee that he/she cannot sign the agreement before their last day of work. Alternatively, you can prepare a two-step severance agreement that the employee must sign upon agreeing to a transition plan, and again on the employee's last day of work.

As this list reveals, there are numerous legal land mines in the separation agreement process. As you go through this "fire drill," it is prudent to always keep in mind that your "form" will have to be modified to address the particular circumstances at hand. •

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